No. 87-5546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DONALD GENE FRANKLIN,

Petitioner

v.

JAMES A. LYNAUGH, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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ARGUMENT

A. A Rational Juror Could Have Entertained A Residual Doubt About Guilt Despite Finding That Mr. Franklin Acted Deliberately

As Mr. Franklin demonstrated in his original brief, the sentencing jury in his case was precluded from considering residual doubt about his guilt as a mitigating circumstance. Texas contends that "a defendant is not constitutionally entitled to rely on such [residual] doubts as a mitigating factor." Respondent's Brief pp. 27-28. This is clearly wrong. In fact, this Court has held that the sentencer may not be precluded from considering "as a mitigating factor, any aspect of a defendant's character or record and *any of the circumstances of the offense* that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (emphasis supplied). It is difficult to imagine a more relevant mitigating "circumstance of the offense" than a doubt about whether the defendant committed the offense.

The state also argues that, even if residual doubt can be a relevant mitigating circumstance, it was adequately considered by the sentencing jury in answering special issue number one, which asks whether defendant acted deliberately. The record belies this assertion.

The first special issue's focus on the mental state of deliberation had nothing whatsoever to do with the principal residual doubt argued by Mr. Franklin's attorney, which was concerned with whether he had been mistakenly identified as the perpetrator of the offense. The question submitted at the punishment phase reads as follows:

> Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Donald Gene Franklin, *that caused the death of Mary Mar-*

garet Moran, was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

[T.I.—54]; JA 15 (emphasis supplied). As is clear from the question, the sentencing jury was not concerned in any degree with *whether* Mr. Franklin was the perpetrator of the instant offense; indeed, it was instructed that his conduct had "caused the death." Given the manner in which the question was put to the jury, it cannot fairly be said that it left any room whatsoever to argue doubt—residual, reasonable, or otherwise—that Mr. Franklin had been mistakenly identified.

B. A Rational Juror Could Have Affirmatively Answered Special Issue Number Two Without Giving Independent Mitigating Weight To Evidence That Mr. Franklin Had Not Been A Disciplinary Problem In Prison

Texas concedes, as it must, that evidence of Mr. Franklin's exemplary behavior while imprisoned for seven years in the Texas Department of Corrections is a relevant mitigating circumstance. Respondent's Brief, p. 30. It further argues, however, that this evidence has no independent mitigating weight apart from its relevance to his probable future conduct, which is clearly comprehended by special issue number two. *Id.* at 31. Such an interpretation is inconsistent with this Court's holdings in *Skipper* v. *South Carolina*, 106 S.Ct. 1669 (1986), and *Lockett* v. *Ohio*, 438 U.S. 586 (1978).

In *Skipper*, the Court specifically noted that the jury "could have drawn favorable inferences from [testimony that petitioner had made a good adjustment to prison life] regarding petitioner's character *and* his probable future conduct if sentenced to life in prison." *Skipper*, 106 S.Ct. at 1671 (emphasis supplied). Thus, the Court has recognized that evidence such as that proved by Mr. Franklin

here might be mitigating *both* as to character *and* as to probable future conduct. And, that *either* of "such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'" *Id.*

The language is consistent with *Lockett* v. *Ohio*, which struck down a state statute which did not permit "*individualized* consideration of mitigating factors" as required by the Constitution. *Lockett*, 438 U.S. at 606 (emphasis supplied). It is for the jury to give individualized consideration to all relevant mitigating factors, and to give those factors the appropriate "independent mitigating weight." *Id.* at 605.

In *Bell* v. *Ohio*, 438 U.S. 637 (1978), the Court applied *Lockett* to invalidate the death sentence of a mentally deficient youngster who contended that the "the Ohio death penalty statute . . . severely limited the factors that would support an argument for mercy. Bell contended that his youth, the fact that he had cooperated with the police, and the lack of proof that he had participated in the actual killing strongly supported an argument for a penalty less than death in this case. He also contended that Ohio's . . . death penalty statute precluded him from requesting a lesser sentence on the basis of those factors." 438 U.S. at 641. In light of Bell's testimony that "he had viewed this co-defendant Hall as a 'big brother' and had followed Hall's instructions because he had been 'scared,'" *Id.* at 641, it is plain that virtually all of the mitigating evidence which Bell contended could not be urged upon his sentencers as the basis for a sentence less than death was in fact relevant to the second mitigating circumstance enumerated in the Ohio statute: "It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation." *Lockett* v. *Ohio*, 438 U.S. at 612. The reason

the Court sustained Bell's claim was not that the evidence to which he and the Chief Justice's opinion pointed could not have been considered at all within the framework of Ohio's statute, but rather that this evidence could not receive "independent mitigating weight" (*Lockett*, 438 U.S. at 605) and that the statute therefore precluded" 'the type of individualized consideration of mitigating factors' . . . required by the Eighth and Fourteenth Amendments." *Bell* v. *Ohio*, 438 U.S. at 642.

Bell thus conclusively rejects Texas' contention that the sentencing procedure employed here was constitutional simply because the mitigating evidence proved was relevant to an enumerated statutory question. Certainly, evidence of good prison behavior was relevant to future dangerousness. But it also had a mitigating potential independently of future dangerousness. Because the instruction given here was framed solely in terms of future dangerousness, however, Mr. Franklin's jury was precluded from giving the "individualized consideration" to this mitigating factor which is required by the Constitution.

CONCLUSION

For these various reasons, the decision below should be reversed.

Respectfully submitted,

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